FILE COPY

Office Supr.
F I
MAR
CHARLES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 693.

JOHN VANCE TAYLOR, PETITIONER,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

R. PALMER INGRAM,
Counsel for Petitioner.

HELEN ELIZABETH BROWN,
Of Counsel.

The Daily Record Co. Print, Baltimore

INDEX.

	PAGE
STATEMENT	1
AFFIDAVIT OF JAMES M. HOFFA	2
ARGUMENT	3
CONCLUSION	8
CASES:	
Bernadas v. Miller, (La.) 129 So. 175	4
City of Seattle v. Bd. of Home Missions of M. P. Church, (C. C. A.) 138 Fed. 307	7
Davis v. Patrick, 122 U. S. 138	7
Gulf, C. & S. F. Ry. Co. v. Jackson, 64 Fed. 70	6
Hotard v. Consolidated Cos. Inc., (La.) 130 So. 662	4
Hunnicutt v. Payton, 102 U. S. 333	7
In re Bills of Exceptions, (C. C. A. 6) 37 F. (2) 849	6
In re Chateaugay, 128 U. S. 544	6
In re Marcellino, (Mass.) 171 N. E. 81	4
Jennings v. Phil. Balt. & Wash. Ry. Co., 218 U. S. 255	5
Macertney v. Givin, 218 Ala. 529	4
Michigan Ins. Bank v. Eldred, 143 U. S. 293	7
Simmons v. Hanne, 50 Fla. 267	4
Street v. United States, 133 U. S. 299	4
Vohlers v. Stafford Mfg. Co., 171 Mich. 8	4
Waldron v. Waldron, 156 U. S. 361	6
TEXTS:	
American, English Ency. of Law, 2 ed., Vol. 28, p. 224	4
Ruling Case Law, Vol. 26, Sec. 23	4

In The

Supreme Court of the United States

October Term, 1931.

No. 693.

JOHN VANCE TAYLOR, Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

PETITIONER'S REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

Statement.

While the Rules of the United States District Court for the District of Maryland appear nowhere in the record of this case and they are not accorded judicial notice by this Honorable Court, Rule 39 of these Rules is quoted at length on page 4 of the Government's Brief. Petitioner feels that if this is to be allowed, a full statement of the surrounding facts should be made, and the following affidavit of Assistant United States Attorney James M. Hoffa setting forth said facts is, therefore, filed and included:

STATE OF MARYLAND,
CITY OF BALTIMORE, TO-WIT:

JAMES M. HOFFA, being first duly sworn according to law upon oath deposes and says: That on February 19, 1931, he was an Assistant United States Attorney for the District of Maryland and as such attorney conducted the prosecution of the case of UNITED STATES versus JOHN VANCE TAYLOR, and that he further settled the Bill of Exceptions prepared in the Appeal of said case to the United States Circuit Court of Appeals, Fourth Circuit, and that the matters hereinafter set forth concerning the preparation of said Bill of Exceptions and the happenings in connection therewith are true and correct to the best of his knowledge, information and belief. The verdict and judgment and Petition for Appeal and Order granting the same in this case were entered and filed on February 19, 1931. On March 14, 1931, the Bill of Exceptions was lodged by counsel for petitioner in the United States Attorney's office and on March 19, 1931, when no action had been taken by the United States Attorney's office, at the request of Mr. O. Norman Forrest, Assistant United States Attorney at that time, for the convenience of the Government, counsel for petitioner prepared a Petition and Order asking that the time for filing of the Bill of Exceptions be extended for a period of thirty days, and again on April 17, 1931, there still had not been any action on the part of the Government, he, Hoffa, being absent, temporarily assigned to the Prohibition Department, Washington, a further Petition and Order asking for another thirty day extension for the filing of said Bill of Exceptions was prepared by petitioner's counsel and duly signed by the District Judge. This last extension expired on Sunday, May 17, 1931. On Saturday, May 16, 1931, he, Hoffa, was engaged in examining the Bill of Exceptions, but when his examination was completed it was found that the District Judge, Honorable William C. Coleman, had gone for the day, when petitioner's counsel

and he went to the Judge's chambers about 11:30 in the morning. That it was then agreed that the Bill of Exceptions would be left with him and that he would present it to the District Judge and have it signed and file it on the following Monday, May 18, 1931. This was done.

And further this deponent saith not.

(Signed) JAMES M. HOFFA.

Subscribed and sworn to before me this 18th day of March, 1932.

(Signed) LORETTA B. SCHLINGMAN,

(Notary's Seal.) Notary Public.

(Original filed with the Clerk of the Supreme Court of the United States.)

ARGUMENT.

The Government's contention that the evidence in this case is not properly before the Court is untenable and is not supported by the decisions of this Honorable Court.

The final Order governing the filing of the Bill of Exceptions extended the time to May 17, 1931. The expiration day was Sunday. The Bill was signed and filed on Monday, May 18, 1931. The fact that the last day fell on Sunday operated to extend the time to the next day of which the business of the Court could legally be transacted.

In the construction of rulings of Court in respect to time for pleading and other mere matters of practice, it is well settled that if the last day falls on Sunday the party has the whole of the next day of which to perform

the act required, and in many of the States this ruling has been adopted by statute or ruling of Court.

26 R. C. L., Sec, 23.
American, English Ency. of Law, 2d ed., Vol. 28, p. 224.
In re Marcellino (Mass.), 171 N. E. 81.
Simmons v. Hanne, 50 Fla. 267.
Macertney v. Givin, 218 Ala. 529.
Bernadas v. Miller (La.), 129 So. 175.
Hotard v. Consolidated Companies, Inc. (La.), 130 So. 662.
Vohlers v. Stafford Manufacturing Co., 171 Mich. 8, 12.

The authorities are in agreement that when the extended return day falls on a *dies non*, the defendant has all of the next day to apply for an extension or to file the transcript.

Bernadas v. Miller, supra.

This Honorable Court has held that even where a law of Congress limits the time for the performance of an act, if the final day of such limited period falls on Sunday, the act may be performed on the succeeding day.

Street v. United States, 133 U. S. 299.

The above case concerned an Act of Congress which set January 1, 1879, as the last day on which the President of the United States could muster out supernumerary army officers. January 1, 1879, was Sunday, and it was held that the power under this statute could be exercised on the following Monday. Mr. Justice Brewer, speaking for the Court, said:

"Again, it must be noticed that the 1st day of January was Sunday, that is, a *dies non*, and a power

> that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day."

The question involved in Jennings v. Phil. Balt. & Wash. Ry. Co., 218 U. S. 255, cited by the Government, was whether the Supreme Court of the District of Columbia exceeded its jurisdiction in allowing a Bill of Exceptions after the close of the term at which the Judgment sought to be revised had become final. After discussing the circumstances and rules governing this particular case, this Honorable Court said:

> "A different case might arise if, by its failure to object the appellant had been misled to his injury. * * *
>
> "So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost all judicial power over the record should not rest upon a mere implication from silence. There should be express consent, or conduct which should equitably estop the opposite party from denying he had consented."

In the instant case there are both express consent and conduct which would equitably estop the Government from denying such consent. However, the Government is not denying consent, but on the contrary, those Government officers who have heretofore been in charge of the prosecution of this case readily admit such consent which is shown not only by affidavit but by the signed statement of the United States Attorney and his Assistant at the end of the Bill of Exceptions that, "This Bill of Exceptions is agreed upon" (R. 19), together with the date mark "5/18/31," which agreement includes time as well as contents.

An endorsement upon the Bill, "We agree upon the above, the foregoing Bill of Exceptions," signed by counsel after an extension by insufficient order, was held to be a waiver of any objections to the order in Gulf, C. & S. F. Ry. Co. v. Jackson, 64 Fed. 70.

It would be unjust and inequitable to allow the Government to raise this objection at this time and thereby profit by its own delay. The Government is estopped by its conduct from pursuing such a course or denying that it consented to the acts as performed.

The facts in the instant case bring it within the term "extraordinary circumstances" referred to in the decisions. In re Bills of Exceptions (C. C. A. 6) 37 F. (2) 849, 851, the Court said:

> "The illness or absence of the judge at the very end of the time limited, so that presentation cannot be made to him personally, is doubtless one of the 'extraordinary circumstances' sometimes referred to. (See cases, infra.) When the bill of exceptions is completed or thought to be ready for submission to the judge for his signature, and is tendered on or about the last day at his official residence, but cannot be actually presented because of illness or absence, we see no reason why this should not be considered as a constructive presentation to him at that time and place, giving opportunity for an effective bill of exceptions if he thereafter (at least promptly thereafter) approves and signs it; and this constructive presentation may well be the logical basis of the Chateaugay Case, 128 U. S. 544, 9 S. Ct. 150, 32 L. Ed. 508, and the Sater Case (C. C. A. 6) 223 F. 611, infra."

Not only is the Government's contention untenable, but the question cannot be raised at this time and it has been distinctly so held by this Court in Waldron v. Waldron,

156 U. S. 361. While it is true it does not appear from the record that the Bill of Exceptions was lodged with the United States Attorney on the 14th day of March, 1931, that fact was made immaterial when the Judge below settled the Bill. In City of Seattle v. Board of Home Missions of the M. P. Church, (C. C. A.) 138 Fed. 307, it was held that where a bill of exceptions not filed within the proper time was duly settled and certified by the court it was presumed on appeal that the court had relaxed the rule for some good reason and a motion to strike out the bill was denied.

It is also to be noted that the Government's Brief which should have been filed on Friday, March 11, 1932, under Rule 35, Section 3a, of this Court, was not filed until Saturday, March 12, 1932, and copy was not received by petitioner's counsel until Monday, March 14, 1932, the day set for presentation of the Petition for Writ of Certiorari. However, no point is made of this. If any objection could have been made, it should have been made by the Government at that time, and failure to make such an objection conclusively shows agreement on the part of the Government. The question here raised is controlled by the decision of this Court in Waldron v. Waldron, supra, in which, at page 378, Mr. Justice WHITE said:

> "The motion to dismiss or affirm is without merit. The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered, was lawful if done by consent of parties given during that term. Hunnicutt v. Peyton, 102 U. S. 333; Davis v. Patrick, 122 U. S. 138; Michigan Ins. Bank v. Eldred, 143 U. S. 293.
>
> "The fact that the bill of exceptions was not handed to counsel for defendant on or before Nov. 15, 1890, does not appear of record, and if it did, it

would be rendered immaterial by the action of the judge below in settling the bill.

"If the bill was not delivered to counsel within the time fixed by the agreement, objection to the failure so to deliver it should have been urged when the bill was settled. And if an objection then taken was overruled, the question of the correctness of such action should have been then reserved."

CONCLUSION.

It is, therefore, contended that the evidence in this case is properly before this Court. Legally, the Bill of Exceptions was settled within the time limit of the final extension order, and the Government is estopped by its own conduct from urging the contention upon this Honorable Court.

Respectfully submitted,

R. PALMER INGRAM,

Counsel for Petitioner.

HELEN ELIZABETH BROWN,

Of Counsel.